

HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,) No. CR18-294-RSM
Plaintiff,)
v.) DEFENSE TRIAL BRIEF
VOLODIMYR PIGIDA,)
Defendant.)

Volodimyr Pigida, through counsel, respectfully submits the following trial brief to address certain issues that may arise throughout trial.

I. THE GOVERNMENT'S ACCUSATIONS AND BACKGROUND FACTS

In fall of 2012, Mr. Pigida established an internet business called Trend Sound Promoters (TSP). The business was designed to serve as an advertising and networking platform for musicians, artists, and entrepreneurs. The heart of the TSP business model was to create web traffic to the TSP website in order to attract advertisers while creating a strong network of members who would buy, sell, and promote TSP products and services.

Mr. Pigida's vision included developing a network of musicians, artists, and other entrepreneurs, known as Independent Promoter Distributors (IPDs), who could drive traffic to the TSP website and also use the platform as a marketplace for their own products. Since Mr. Pigida himself was a professional musician, he used the TSP platform as a vehicle to distribute his own copyright-protected recordings that were produced by another company he owned called SoundTrack Studios (STS). Since TSP

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1 focused on marketing music, its business model eventually included a “mini music
 2 store” on the website that would permit musicians to buy and sell digital copies of
 3 Mr. Pigida’s recordings in addition to recordings produced by other musicians.

4 For TSP to grow, Mr. Pigida knew that the site needed to generate a significant
 5 amount of internet traffic. Instead of paying traditional search engines, Mr. Pigida
 6 believed it would be more cost effective to use “independent promoters” to generate
 7 web traffic for TSP by routinely visiting the TSP website and by marketing TSP
 8 services to their communities. This traffic would attract advertisers and help TSP
 9 advance upward in search engine results. Mr. Pigida therefore packaged the right to
 10 resell his copyright-protected music with an offer to pay the IPDs to distribute the TSP
 11 promotional materials. The payment system for the IPDs would not be the traditional
 12 salary or hourly rate. Rather, payments would be more consistent with a commission-
 13 style method where they would be paid \$0.40 for each promotional email that they sent.
 14 The IPDs would also receive 80% of the proceeds from the music, products, or services
 15 they sold on the TSP platform. Finally, the IPDs would receive a 10% referral bonus for
 16 signing new promoters. All of these terms and conditions were explicitly described in
 17 an operating agreement that the promoters had to review and accept before they could
 18 purchase a package.

19 The indictment alleges that TSP functioned as a Ponzi scheme in that the
 20 packages were worthless and only served to attract new IPDs to buy more packages.
 21 Additionally, the indictment alleges that the promoters were defrauded when the
 22 operating agreement contract changed in January of 2014 to increase the sales
 23 requirements in order to receive compensation. The defense disputes those allegations
 24 and will offer proof that the IPDs were sufficiently informed about each package
 25 together with the terms and conditions of their compensation, including the changes that
 26 were made in January of 2014. Moreover, TSP was represented by an in-house

1 corporate attorney throughout most of its existence—starting in June of 2013. The
 2 corporate lawyer, Annette Mouton, re-drafted the IPD terms and conditions and
 3 operating agreement starting in August of 2013. More important, Ms. Mouton drafted
 4 the January 2014 changes to the same operating agreement that the government claims
 5 resulted in defrauding the IPDs. At all times, these changes were posted on the TSP
 6 website for all promoters to review at their convenience and were meant to apply
 7 prospectively when a promoter bought a new package after the changes went into
 8 effect. Accordingly, TSP was not a Ponzi scheme or any other type of fraudulent
 9 business that the government is alleging.

10 On April 24, 2014, TSP, through counsel, filed for Chapter 11 bankruptcy. The
 11 indictment alleges that Mr. Pigida moved real and personal property into trust during
 12 the weeks prior to that bankruptcy filing in order to conceal assets. Similarly, the
 13 indictment alleges that Mr. Pigida made false statements in furtherance of concealing
 14 the property in bankruptcy. As presented in earlier pleadings, the defense will argue that
 15 the properties placed into trust were not part of TSP's estate. Instead, those properties
 16 were purchased by other entities and therefore would not belong on the bankruptcy
 17 work schedules or the Statement of Financial Affairs. Put simply, TSP cannot list assets
 18 that it does not own on the bankruptcy forms and schedules. Accordingly, there was no
 19 concealment.

20 At all times throughout the bankruptcy process, Mr. Pigida was represented by
 21 counsel. During Chapter 11 bankruptcy, Mr. Pigida retained Larry Feinstein and the
 22 TSP corporate lawyer Annette Mouton to serve as bankruptcy counsel. When the
 23 bankruptcy proceedings shifted to Chapter 7, Ms. Mouton remained as counsel together
 24 with James Ware of the MDK law firm. During Chapter 7, Mr. Feinstein briefly
 25 appeared during the Section 341 creditors hearing, but then dropped out of the case as
 26 Ms. Mouton and MDK took over the legal representation.

1 At trial, the defense will present evidence of Mr. Pigida's interactions with his
 2 lawyers throughout the development of TSP and the bankruptcy process. This evidence
 3 will include testimony from Ms. Mouton, the billing records, and various other business
 4 and legal records. Overall, the evidence will show that Mr. Pigida never acted with the
 5 intent to defraud. Rather, at all times, he was transparent with his lawyers and with the
 6 promoters. Mr. Pigida endeavored to make sure that the promoters fully understood
 7 everything about the TSP packages before purchasing them.

8 **II. PRIOR RULINGS OF THE COURT**

9 The Court previously denied Mr. Pigida's motions to sever and to dismiss.
 10 Unless instructed otherwise by the Court, Mr. Pigida will renew his severance motion at
 11 the conclusion of the government's case, the defense case, and the evidence. *See United*
 12 *States v. Sullivan*, 522 F.3d 967, 981 (9th Cir. 2008) (holding that a severance motion
 13 must be renewed unless "renewing the motion would have been an unnecessary
 14 formality.").

15 **III. ANTICIPATED LEGAL ISSUES**

16 **A. Nature of the alleged conspiracy**

17 Count one alleges a conspiracy "to commit offenses against the United States, to
 18 wit: wire fraud, in violation of Title 18, United States Code, Section 1343, mail fraud,
 19 in violation of Title 18, United States Code, Section 1341, *and* bankruptcy fraud, in
 20 violation of Title 18, United States Code, Section 157." *See* Dkt 1 at 1 (emphasis
 21 added). There should be no dispute that Count one is duplicitous. Duplicity is the
 22 joining of two or more distinct and separate offenses in a single count. *United States v.*
 23 *Ramirez-Martinez*, 273 F.3d 903, 913 (9th Cir. 2001), *overruled on other grounds in*
 24 *United States v. Lopez*, 484 F.3d 1186, 1191 (9th Cir. 2007). A duplicitous indictment
 25 precludes assurance of juror unanimity, and may prejudice a subsequent double
 26 jeopardy defense. *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976)

1 (“One vice of duplicity is that a jury may find a defendant guilty on a count without
 2 having reached a unanimous verdict on the commission of a particular offense.”); *see*
 3 *also Ramirez-Martinez*, 273 F.3d at 913.

4 The remedy for a duplicitous count is as follows:

5 [A] defendant indicted pursuant to a duplicitous indictment may be
 6 properly prosecuted and convicted if either (1) the Government elects
 7 between the charges in the offending count, or (2) the court provides an
 8 instruction requiring all members of the jury to agree as to which of the
 9 distinct charges the defendant actually committed.

10 *Ramirez-Martinez*, 273 F.3d at 915.

11 When an indictment charges a single conspiracy to violate multiple statutes, the
 12 jury may only convict on that single conspiracy count *if it unanimously finds that the*
 13 *defendant conspired to violate at least one of the statutes. See United States v. Gordon*,
 14 844 F.2d 1397, 1401 (9th Cir. 1988) (concluding that a duplicitous conspiracy count
 15 obligates the trial judge to submit special interrogatories to ensure a unanimous
 16 verdict). In other words, if the government chooses not to elect one object of the
 17 conspiracy (i.e., Wire Fraud, Mail Fraud, or Bankruptcy Fraud), then the Court must
 18 submit an instruction that requires the jury to unanimously find at least one of the three
 19 objects beyond a reasonable doubt before convicting on Count 1.

20 B. Summaries

21 The parties anticipate that summary charts and exhibits will be used in this trial
 22 to avoid juror confusion and to present the case in the most efficient manner for the
 23 jury. To the extent that the government seeks to offer exhibits that summarize its
 24 investigation or conclusion, the government must first make available the underlying
 25 data, and establish its independent admissibility. *See* Fed. R. Evid. 1006 (summaries to
 26 prove content); *Air Safety, Inc. v. Roman Catholic Archbishop of Boston*, 94 F.3d 1, 7
 (1st Cir. 2006) (“Common sense dictates that [Rule 1006’s] guaranteed access,
 designed to give the opponent the ability to check the summary’s accuracy and prepare

1 for cross examination . . . must include unequivocal notice of the party's intent to
 2 invoke Rule 1006 Thus, to satisfy the 'made available' requirement, a party
 3 seeking to use a summary under Rule 1006 must identify its exhibit as such, provide a
 4 list or description of the documents supporting the exhibit, and state when and where
 5 they may be viewed.").

6 The government cannot circumvent this rule by offering testimony, rather than
 7 an exhibit, describing conclusions drawn from hearsay, e.g. bank records, without
 8 substantiating those conclusions with the underlying data. *See United States v. Nguyen*,
 9 504 F.3d 561, 572 (5th Cir. 2007) (Summary witnesses may not be used as a substitute
 10 for, or a supplement to, closing argument.).

11 **C. Evidentiary issues**

12 **1. Hearsay**

13 One issue that will develop during the trial is the question of whether Mr. Pigida
 14 was fully transparent with his lawyers to enable them to provide meaningful advice.
 15 The government has provided notice that they intend to offer various statements that
 16 Mr. Pigida made to law enforcement and other witnesses as well as during the formal
 17 bankruptcy proceedings (including declarations, testimony, depositions, and
 18 interrogatories). In order for the Court and the jury to assess whether or not Mr. Pigida
 19 made full disclosures to his attorneys, the defense will offer out-of-court statements
 20 Mr. Pigida made to the lawyers to prove his transparency with his attorneys. This
 21 evidence will be critical for the jury to determine whether Mr. Pigida acted with the
 22 intent to defraud or whether, as the defense argues, he acted in good faith.

23 Additionally, the government alleges that Mr. Pigida concealed certain facts
 24 from the bankruptcy court and from promoters. To defend against that charge,
 25 Mr. Pigida will need to introduce evidence of his disclosures. For example, the
 26 government alleges that Mr. Pigida willfully concealed loans to TSP on the Statement

1 of Financial Affairs (SOFA) during the bankruptcy proceedings. *See* paragraph 60 of
 2 the indictment (alleging that Mr. Pigida failed to disclose, among other things, loans on
 3 the SOFA). Evidence that Mr. Pigida disclosed the existence of private loans to his
 4 attorney would not be offered to prove the truth of the matter asserted (i.e., that TSP
 5 actually received loans), but rather offered to prove that Mr. Pigida *made the disclosure*
 6 about loans to his attorney during the bankruptcy proceedings prior to Chapter 7
 7 conversion. Similarly, Mr. Pigida's statements describing the nature of the TSP
 8 business model would not be offered to prove the truth of the matters asserted (i.e., the
 9 specifics or efficacy of the business model), but rather offered to rebut the
 10 government's claim that TSP is a Ponzi scheme or that somehow Mr. Pigida concealed
 11 material facts from the promoters.

12 A statement is hearsay if it is (1) an assertion that (2) is made out of court and
 13 (3) is offered to prove the truth of the matter asserted. *See* Fed. R. Evid. 801(c).
 14 Statements offered to prove knowledge or establish context, rather than to prove the
 15 truth of the matter asserted, are not hearsay. *See, e.g., Crowley v. L.L. Bean, Inc.*, 303
 16 F.3d 387, 408 (1st Cir. 2002) (A statement offered to show declarant's knowledge of
 17 facts, not facts stated, is admissible non-hearsay); *see also United States v. Fernandez*,
 18 914 F.3d 1105, 1111–12 (7th Cir. 2019) (error to prevent defense from introducing
 19 statements for their effect on listener); and *United States v. Smith*, 816 F.3d 479, 481
 20 (7th Cir. 2016) (Informer's side of taped conversation with accused necessary to place
 21 statements in context and not offered for the truth of the matter asserted). Accordingly,
 22 Mr. Pigida's statements that are offered to establish context for the TSP business model,
 23 to rebut the "Ponzi scheme" allegation, or to prove transparency with the lawyers and
 24 with the promoters would not be hearsay. Their admission is essential to protect
 25 Mr. Pigida's rights under the Fifth and Sixth Amendments.

26

2. Rule of completeness

Mr. Pigida has testified and provided sworn declarations in two separate bankruptcy proceedings. Depending on how evidence of his testimony is edited, Mr. Pigida may seek to introduce other portions of the testimony or declarations to avoid distortion. *See Fed. R. Evid. 106; United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996) (“[W]hen one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible.”).

3. Impeachment

An “answer that [a witness does] not remember having made a prior statement is as adequate a foundation for impeachment as a flat denial.” *United States v. Collicott*, 92 F.3d 973, 981–82 (9th Cir. 1996). *See also United States v. Bullcalf*, 563 F. App’x 535, 536 (9th Cir. 2014) (same). If any government witness either denies having made a statement, or claims to have no recollection of making the statement, the defense must be permitted to impeach the witness by contradiction by offering those statements.

IV. STIPULATIONS

Mr. Pigida anticipates that the parties will stipulate to authenticity and foundation for most, if not all, of the exhibits offered by each party. However, the parties will reserve other objections, including objections related to hearsay, relevance, and undue prejudice. Counsel notes in advance that the government's proposed exhibits include inadmissible and objectionable bankruptcy filings, including the complaint and motion to convert.

The defense will introduce the recorded depositions of Maksym Bezorudko. Those were taken without objection and with leave of Court. Two exhibits were introduced, without objection, during the deposition. *See* Dkt. 146.

1 Finally, in order to streamline the presentation of evidence, the parties have
 2 agreed that Mr. Pigida may examine the government's witnesses about matters beyond
 3 the scope of their direct examination, rather than recalling the witness in the defense
 4 case in chief.

5 **V. WITNESS LIST**

6 Mr. Pigida expects that he will present his case primarily through the
 7 government's witnesses. In addition to the witnesses on the government's witness list,
 8 Mr. Pigida may call:

- 9 1. Maksym Bezorudko
- 10 2. Kenneth Hines
- 11 3. Jeff Rougvie
- 12 4. Yuriy Golub
- 13 5. Alexander Shuvarikov
- 14 6. Daniil Pigida
- 15 7. Valeria Ivanova

16 Mr. Pigida reserves the right to add witnesses to this list. He also may recall any
 17 witnesses as may be necessary to complete the impeachment of a later witness.

18 **VI. CRIMES OF DISHONESTY**

19 A party may attack a witness's credibility using evidence "for any crime,
 20 regardless of the punishment, . . . if the court can readily determine that establishing the
 21 elements of the crime required proving—or the witness's admitting—a dishonest act or
 22 false statement." Fed. R. Evid. 609(a)(2). Two of the witnesses identified on the
 23 government's witness list have convictions for crimes that involved dishonest acts or
 24 false statements. Specifically, David Kaletnik was convicted on October 7, 2009 in
 25 Lower Kittias District Court for making a false statement to a public servant, and
 26 Yevgeniy Litovchenko was convicted on July 13, 2004 in Wright County, Minnesota

1 for aggravated forgery or counterfeiting money. Each of those offenses necessarily
 2 involves a dishonest act or false statement.

3 As both of those convictions occurred more than ten years ago, Mr. Pigida must
 4 demonstrate that the convictions' "probative value, supported by specific facts and
 5 circumstances, substantially [outweigh their] prejudicial effect" and Mr. Pigida "gives
 6 [the] adverse party written notice of the intent to use [them] so the adverse party has a
 7 fair opportunity to contest [their] use." Fed. R. Evid. 609(b). Through this trial
 8 memorandum, Mr. Pigida is giving that written notice of his intent to use the
 9 convictions at trial and, when he uses them, he will provide certified copies of court
 10 records to demonstrate that the probative value of the convictions substantially
 11 outweigh any prejudicial effect.

12 **VII. JURY INSTRUCTIONS**

13 The defense's proposed jury instructions will be filed under separate cover.
 14 Mr. Pigida reserves the right to present other instructions as may be justified in light of
 15 the trial evidence. Those may include an advice of counsel instruction. *See* Ninth
 16 Circuit Model Instruction 5.10.¹

17 DATED this 8th day of November 2022.

18 Respectfully submitted,

19 *s/ Jesse Cantor*
 20 Assistant Federal Public Defender

21 *s/ Gregory Murphy*
 22 Assistant Federal Public Defender

23 Attorneys for Vladimir Pigida

24

25 ¹ That instruction states, in part, "Unlawful intent has not been proved if the defendant,
 26 before acting, made full disclosure of all material facts to an attorney, received the
 attorney's advice as to the specific course of conduct that was followed, and reasonably
 followed the attorney's recommended course of conduct or advice in good faith."